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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, in his official capacity as Attorney General,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL WRITERS UNION, CHARLES BAXTER, WENDELL BERRY, GUY DAVENPORT, WILLIAM GASS, PATRICIA HAMPL, EVA HOFFMAN, URSULA K. LEGUIN, BARRY LOPEZ, PETER MATTHIESSEN, JACK MILES, DAVID FOSTER WALLACE, LAWRENCE GOLAN, RONALD HALL, RICHARD KAPP, JOHN MCDONOUGH, THE UNITED STATES PUBLIC POLICY COMMITTEE FOR THE ASSOCIATION OF COMPUTING MACHINERY, COMPUTER PROFESSIONALS FOR SOCIAL RESPONSIBILITY, THE APACHE SOFTWARE FOUNDATION, THE DOMAIN NAME RIGHTS COALITION, THE CENTER FOR THE PUBLIC DOMAIN, PUBLIC KNOWLEDGE, THE DIGITAL FUTURE COALITION, THE PUBLIC DOMAIN RESEARCH CORPORATION, THE CENTER FOR BOOK CULTURE, LITNET, THE COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION, AND THE CONSUMER ELECTRONICS ASSOCIATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

This brief *amici curiae* in support of Petitioners is submitted by the National Writers Union, Charles Baxter, Wendell Berry, Guy Davenport, William Gass, Patricia Hampl, Eva Hoffman, Ursula K. LeGuin, Barry Lopez, Peter Matthiessen, Jack Miles, David Foster Wallace, Lawrence Golan, Ronald Hall, Richard Kapp, John McDonough, The United States Public Policy Committee for the Association of Computing Machinery, Computer Professionals for Social Responsibility, the Apache Software Foundation, the Domain Name Rights Coalition, the Center for the Public Domain, Public Knowledge, the Digital Future Coalition, the Public Domain Research Corporation, The Center for Book Culture, LitNet, the Computer and Communications Industry Association, and the Consumer Electronics Association ("*Amici*"), pursuant to Rule 37 of the Rules of this Court. *Amici* urge that the Court hold in favor of Petitioners and reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit.

The National Writers Union is the only labor union that represents freelance writers in all genres, formats, and media. NWU's president, Jonathan Tasini, was the original plaintiff in *New York Times v. Tasini*, a case decided by this Court last term.

Charles Baxter is a fiction writer whose novel, *The Feast of Love*, was a 2000 National Book Award finalist and a New York Times Notable Book. Wendell Berry is the author of

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1. Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, or their counsel made a monetary contribution to the preparation or submission of this brief. American University, Washington College of Law, Glushko-Samuelson Intellectual Property Clinic students Christine Calareso, Lincoln Harris, Sheryl Rakestraw, and Timothy Tyre prepared this brief under the supervision of Professors Ann Shalleck, Joshua Sarnoff and Peter Jaszi, Counsel of Record.

9 works of fiction, 14 books of poetry, and 14 works of nonfiction, including *The Unsettling of America*. Berry is a recipient of a National Institute of Arts and Letters Award. Guy Davenport is an essayist, poet, critic and artist. He is a MacArthur Fellow and a winner of the O. Henry Award for fiction. William Gass, a recipient of the American Book Award for fiction and the National Book Critics Circle Award in criticism, has authored more than a dozen works of fiction and criticism. He was Distinguished University Professor in the Humanities at Washington University. Patricia Hampl's books include *A Romantic Education* and *Virgin Time*. A MacArthur Fellow, Hampl is currently Regents' Professor and McKnight Distinguished Professor of English at the University of Minnesota. Eva Hoffman is known for her memoir, *Lost in Translation*, and for her writings on Eastern Europe. A former editor at the *New York Times*, Hoffman currently teaches at the Massachusetts Institute of Technology. Lewis Hyde is a poet, translator, and prose writer whose works include *Trickster Makes This World*. He is the Thomas Professor of Creative Writing at Kenyon College and a MacArthur Fellow. Ursula K. LeGuin is the author of 17 novels and 11 children's books, as well as essays and poetry. Her awards include the National Book Award and a Newberry Silver Medal. Barry Lopez received the 1986 National Book Award for *Arctic Dreams*. Peter Matthiessen is a novelist and environmental activist whose nonfiction includes *The Snow Leopard*, which won the National Book Award. Jack Miles, senior advisor to the President of the J. Paul Getty Trust, won the Pulitzer Prize for his first book, *God: A Biography*. David Foster Wallace is the author of *Infinite Jest* and is a regular contributor to *Harper's*.

Lawrence Golan, Ronald Hall, Richard Kapp and John McDonough are the plaintiffs in an action currently before the United States District Court for the District of Colorado, seeking declaratory relief from and questioning the constitutionality of the Copyright Term Extension Act and the Uruguay Round Agreements Act. Golan is the Director of Orchestral Studies,

Conductor, and Professor of Conducting at the University of Denver's Lamont School of Music. He also conducts the Portland Ballet Orchestra, the Atlantic Chamber Orchestra, the Bolshoi National Opera and the Ballet Theatre of Uzbekistan. Kapp is the founder and conductor of the chamber orchestra Philharmonia Virtuosi and founder of the recording label ESS.A.Y Recordings. Hall is the founder of Festival Films, which sells public domain stock footage of movies and television shows. McDonough is the founder of Timeless Video Alternatives International, which preserves and distributes public domain movies and television shows.

The United States Public Policy Committee of the Association for Computing Machinery serves as the focal point for the association's interaction with U.S. government organizations, the computing community and the public in all matters of public policy related to information technology.

Computer Professionals for Social Responsibility is a public interest alliance of computer scientists and others concerned about the impact of computer technology on the public.

The Apache Software Foundation is a non-profit organization that promotes and supports the development of open-standards-based software.

The Domain Name Rights Coalition educates the public, religious groups, charitable organizations, non-profit groups and small businesses on how to choose, protect and defend domain names, and promotes free speech and communication.

The Center for the Public Domain passionately believes that the scientific, artistic and entrepreneurial spirit of our society relies on access to a robust public domain.

Public Knowledge is a public-interest advocacy and research organization that works with diverse creators,

consumers, civic groups and enlightened businesses to ensure that public access, creativity and competition are embodied in the digital age.

The Digital Future Coalition is an alliance of many of the nation's leading non-profit educational, scholarly, library and consumer groups, along with major commercial trade associations representing leaders in consumer electronics, telecommunications, computer and network access industries.

The Public Domain Research Corporation provides news and research about works that are in the public domain for multimedia, recording, film, television and other entertainment and publishing industry professionals.

The Center for Book Culture is a book and magazine publisher with literary programs in Chicago and at Illinois State University.

LitNet is a coalition of nonprofit literary organizations across the country and an educational and advocacy organization that promotes and protects the interests of writers and literary organization.

The Computer and Communications Industry Association is the leading industry advocate in promoting open, barrier-free competition in computer and communications products and services worldwide.

The Consumer Electronics Association is the trade association that represents over 600 major manufacturers of audio, video and home information equipment with over $90 billion in sales in the United States last year.

* * * * *

Amici are the vital links in the design of the United States copyright system, the creators and innovators who produce works that benefit the public through a process that the Copyright Term Extension Act ("CTEA") threatens. *Amici*, themselves copyright holders, are critical actors in a balanced copyright system, receiving incentives, benefiting from measured protections, gaining inspiration from, contributing to and utilizing copyright's public domain. *Amici* support a healthy balance between copyright protection and access to information. The CTEA personally affects *amici* because they experience restricted access to existing copyrighted materials including books, films, music and software. As a result, they are unable to reinterpret many works of the past to create new works. *Amici* offer a unique viewpoint on the actual effects of overprotective copyright laws and, thus, submit this brief to urge this Court to rule in favor of Petitioners and find the CTEA unconstitutional.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Distric: of Columbia Circuit incorrectly held that the Copyright Term Extension Act[2] ("CTEA") as passed by Congress in 1998 is constitutional.[3] The CTEA violates the Constitution by failing to promote the progress of science and useful arts.[4] The Framers of the Constitution understood that the creation of new works

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2. Pub. L. No. 105-298, 112 Stat. 2827 (1998). The CTEA grants an additional twenty years of protection to all works, except those created before Jan. 1, 1978 and not published prior to Jan. 1, 2003. Copyright Act, 17 U.S.C. §§ 302-303 (2000).

3. *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001).

4. U.S. Const. art. I, § 8, cl. 8 ("Congress shall have the Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

and subsequent public access to those works were vital to society; thus, they limited the copyright monopoly's duration to assure the development of a healthy public domain. The public domain serves not only as the repository of accessible works for enjoyment and use, but also as a foundation for new creations. The CTEA's passage has already significantly diminished the public domain, which remains in jeopardy.

The Constitution imposes a duty upon Congress in enacting any intellectual property law to determine that its legislation promotes innovation. However, of the major justifications for term extension set forth before Congress, including European Union harmonization, benefits to authors' families and film preservation are peripheral to the stated purpose of copyright: to promote cultural progress. Nor does the CTEA provide meaningful incentives to that end. In enacting the CTEA, Congress failed to ensure the progress of science and the useful arts, as required in the exercise of its power to create copyright protection.

ARGUMENT

I. THE FRAMERS INTENDED THAT COPYRIGHT PROTECTION PROVIDE A BALANCE BETWEEN PROTECTION FOR CREATIONS AND PUBLIC ACCESS TO THEM

Following the model of the English Statute of Anne, the founders of the American system of government created a copyright law that would operate for public, not private, benefit.[5] So strong were their sentiments about the appropriate goals of

5. *See generally* Paul J. Heald and Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119 (2000); Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. Intell. Prop. L. 315 (2000).

copyright legislation that the grant to Congress of only limited power to act with respect to copyright was set forth in the Constitution.[6] The author is at the center of United States ("U.S.") copyright doctrine, but not because creators are its intended beneficiaries. Rather, innovators and creators are the instruments through which the law's public purpose is carried out. Characterizing this constitutional approach, the Court stated in *Harper & Row Publishers, Inc. v. Nation Enterprises*:[7]

> By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas. This Court stated in *Mazer v. Stein, 347 U.S. 201, 209 (1954)*: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"

As recently as last term, this Court reiterated that incentives for "individual effort" by creators are an essential part of the scheme envisioned in the Constitution.[8]

For the public purpose of copyright to be fulfilled, however, more than just economic incentives to authors are required: A healthy and vibrant public domain is essential to assure the continued supply of source material for innovation and creation. This aspect of the architecture of U.S. copyright law is reflected in the constitutional restriction on the duration of intellectual

6. U.S. Const. art. I, § 8, cl. 8.

7. 471 U.S. 539, 558 (1985).

8. *New York Times Co. v. Tasini*, 533 U.S. 483, 496 n.3 (2001).

property protection to "limited times."[9] Thus, copyright term extension has the potential to undermine the very purpose of copyright law, the promotion of cultural and scientific progress. Such legislation, of which the CTEA is the most recent example, should therefore be subject to careful constitutional scrutiny.[10]

Over the years the Court has repeatedly affirmed the Framers' vision of copyright. In *Steward v. Abend*, the Court stated, "the copyright term is limited so that the public will not be permanently deprived of the fruits of an artist's labor."[11] Similarly, in *Sony Corp. v. Universal City Studios, Inc.*, it stated that copyright "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."[12] Additionally, *Twentieth Century Music Corp. v. Aiken* acknowledged that:

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.[13]

9. U.S. Const. art. I, § 8, cl. 8.

10. *See generally* Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. Copyright Soc'y 19 (2001) (discussing the history of copyright term extension).

11. 495 U.S. 207, 288 (1990).

12. 464 U.S. 417, 429 (1984).

13. 422 U.S. 151, 156 (1975).

Indeed, since 1834, when its decision in *Wheaton v. Peters*[14] categorically rejected natural or "common law" rights in literary property, the Court has repeatedly reaffirmed that the various copyright statutes enacted by Congress must represent a balance between providing protection to authors and assuring access to "the result of their labours [that] may be . . . beneficial to society."[15]

If the goal of copyright law is to "stimulate artistic creativity,"[16] then the integrity of the public domain must not be compromised. The creation of new works is largely dependent upon access to the varied language, research, images, and other content of previous works. The concept that all, or even most, new works are wholly original is unfounded; rather, many great works have been the artful retelling of others' stories.[17] New creations and innovations require the interaction of inspiration with the availability of previous works in all genres, including books, music, software, the visual arts and film.

Many literary works are the interpretations of older stories. Mark Twain was a vocal advocate of broad copyright protection

14. 33 U.S. (8 Pet.) 591 (1834).

15. *Id.* at 657-8; *see also* L. Ray Patterson, *Eldred v. Reno: An Example of the Law of Unintended Consequences*, 8 J. Intell. Prop. L. 223, 231 (2001): "[T]he Constitution requires that the copyright statute Congress enacts shall be designed to do three things: to promote learning, because the clause so states; to protect the public domain, because copyright is available only to authors only for their original writings only for a limited time; and public access. . . ."

16. *Aiken*, 422 U.S. at 156.

17. *See* Jessica Litman, *The Public Domain*, 39 Emory L. J. 965, 966 (1990) ("The very act of authorship in *any* medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea.").

but freely admitted that his work was less than wholly original.[18] Twain once wrote that "substantially all ideas are second-hand, consciously or unconsciously drawn from millions of sources . . . ; whereas there is not a rag of originality about them. . . ."[19] The truth behind this colorful overstatement is seen in Twain's famous work, *The Adventures of Huckleberry Finn*, which was his retelling of Homer's *The Odyssey*.[20] Twain's reliance on the public domain, however, did not end there. Not only is Huck Finn an American version of Ulysses, but Huck's narrative voice draws on and improves the American oral storytelling tradition.

Judge Richard Posner, building upon Melville Nimmer's assertion that *West Side Story* would infringe *Romeo and Juliet* if *Romeo and Juliet* were copyrighted, concluded:

> *Measure for Measure* would infringe *Promos and Cassandra*, *Ragtime* would infringe *Michael Kohlhaas*, and *Romeo and Juliet* itself would have infringed Arthur Brooke's *The Tragicall Historye of Romeo and Juliet*, published in 1562, which in turn would have infringed several earlier *Romeo and Juliets*, all of which probably would have infringed Ovid's story of Pyramus and Thisbe – which in *A Midsummer Night's Dream* Shakespeare staged as a play within the play. If the Old Testament had been copyrighted, *Paradise Lost* would have infringed it, not to mention *Joseph and his Brothers*.[21]

18. *See generally* Siva Vaidhyanathan, *Copyrights and Copywrong: The Rise of Intellectual Property and How it Threatens Creativity* 56 (2001) (noting that Twain boasted of liberally borrowing from others' stories).

19. *Mark Twain's Letters* 731 (Albert Bigelow Paine ed., 1917), *quoted in* Vaidhyanathan. *Id.* at 64.

20. Vaidhyanathan, *supra* note 18, at 69.

21. Richard A. Posner, *Law and Literature* 399 (2d ed. 2000) (citation omitted).

Aggressive copyright laws, in particular the CTEA, impermissibly threaten this kind of cumulative creativity.[22]

Similarly, many renowned musical works are based on previous creations. For example, "Good Night Sweetheart" (1931) is based on themes from Schubert's Symphony in C and Liszt's Preludes, "Love Me Tender" (1956) is based on "Aura Lee" by George Poulton, and "The Lion Sleeps Tonight" (or "Wimoweh") (1962) is based on a traditional African song.[23]

The American blues tradition also illustrates the reliance of creative innovators on the music of the past. The blues originally derived from West African music and rhythm and developed as musicians of each generation repeated and embellished the musical and lyrical contributions of their predecessors. This dynamic process not only carries forward cultural traditions but has generated new musical movements such as jazz and rock and roll.[24]

In other very different domains of innovation, such as computer software development, reliance on pre-existing material in the creation of new works also is ubiquitous. The rapid development of the U.S. software industry since the 1970's has been fueled by the fact that:

> Innovation in software development is typically incremental. Programmers commonly adopt software design elements . . . by looking around for

22. *Id.* at 403 ("The more extensive is copyright protection, the more inhibited is literary imagination. This is not a good reason for abolishing copyright, but it is a reason possibly for narrowing it, and more clearly for not broadening it.").

23. Stephen Fishman, *The Public Domain, How to Find and Use Copyright* 4/38 (2001). *See also* Ochoa, *supra* note 10, at n.10, (discussing additional musical works based on existing works from the public domain).

24. Vaidhyanathan, *supra* note 18, at 125.

> examples or remembering what worked in other programs. These elements are sometimes adopted wholesale, but often they are adapted to a new context or set of tasks. In this way, programmers both contribute to and benefit from a cumulative innovation process.[25]

Software is a young field, and no software has yet entered the public domain via copyright expiration. Nevertheless, software engineers understand the importance of access so well that some programs have achieved near-public domain status. One is the so-called "Berkeley TCP/IP stack" that enables computers to be connected to the Internet. The University of California licenses it on terms that allow anyone to make any use of it, with proper attribution. This software was incorporated into several popular operating systems and played an important role in the growth of the Internet. Ultimately, however, such affirmatively designed substitutes for the public domain cannot be relied upon alone to sustain cumulative innovation.[26]

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25. *See* Pamela Samuelson, *et al.*, *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 Colum. L. Rev. 2308, 2330-31 (1994).

26. Another attempt to approximate a public domain for software is the GNU Public License ("GPL"), which covers many popular copyrighted software programs including the Linux operating system. Software covered by the GPL may be examined and used freely by anyone, provided that any derivative works are also licensed under the GPL. A large and diverse community of programmers works on GPL-covered software and thus contributes to the GPL's pseudo-public domain. Opponents of the GPL's use, such as Microsoft, point out that the GPL prevents the software it covers from being incorporated into commercial products; and thus, they argue, the GPL's pseudo-public domain is an inferior substitute for a real public domain. *See, e.g.*, Prepared Text of Remarks by Craig Mundie, Senior Vice President, Microsoft, Inc., "*The Commercial Software Model*," New York University Stern School of Business, May 3, 2001, http://www.microsoft.com/presspass/exec/craig/05-03sharedsource.asp (last visited May 13, 2002).

Corporate producers of intellectual property as well as individual creators repeatedly have reaped the benefits of using previously created works for inspiration. Most of the Walt Disney Company's widely acclaimed animated feature films are based upon preexisting stories. For example, *Snow White* and *Cinderella* are based upon the Grimm Brothers' *Children and Household Tales* (*Grimms' Fairy Tales)*; while *Pinocchio*, *The Little Mermaid*, *The Jungle Book*, and the *Hunchback of Notre Dame* are based upon modern literary works by Carlo Collodi, Hans Christian Anderson, Rudyard Kipling and Victor Hugo, respectively. Moreover, all these literary works were in the public domain when the films were released. Even the ubiquitous Mickey Mouse bears a striking resemblance to an earlier large-eared, big-footed, button-nosed, wide-eyed, britches-wearing character called Oswald the Lucky Rabbit.[27]

Another example of the derivation of figures of popular culture from preexisting material is the Wile E. Coyote character. Created by cartoonist Chuck Jones for Warner Bros., Wile E. Coyote not only carries the mark of Jones' creativity, but also incorporates elements of multiple preexisting sources and traditions, including Mark Twain's tales of coyotes in *Roughing It* and the Trickster figure of Native American folklore.[28]

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27. *See* Russell Merritt and J.B. Kaufman, *Walt in Wonderland* 86-119 (1993). The similarities between the two characters illustrate the extent to which new creations in the realm of popular culture often rely on preexisting materials. Walt Disney's early Oswald cartoons drew heavily on general cartooning motifs and specific prior copyrighted works. After losing the rights to the design of the Oswald character, Disney nonetheless reused many of its elements in creating Mickey Mouse. *Id.*

28. *See* Shelly Fisher Fishkin, *Lighting Out for the Territory: Reflections on Mark Twain and American Culture* 147-9 (1997); *see also* Lewis Hyde, *Trickster Makes This World* 18-19 (1999) (describing the Native American Trickster character as a coyote that often fell prey to his own traps).

Ironically, companies and industries that have drawn freely on preexisting materials (including those in the public domain) to create their own copyrighted works were instrumental in advocating copyright term extension. The result was legislation, the CTEA, that created a 20-year moratorium on the addition of material to a vital public resource.

The public domain enables creation or "artful retelling" by serving as "a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use."[29] In addition to academic commentators, the judiciary has recognized the importance of this resource:

> Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.[30]

The CTEA exemplifies the concern to which this passage points: freezing the public domain by limiting contemporary creators' access to many works that could generate new creation. This legislation does not nurture creative minds, but instead stifles the process of innovation through overprotection.

Amongst the most glaring omissions Congress made when considering the CTEA were its failures to assess the cost of the

29. Litman, *supra* note 17, at 968.

30. Kozinski, J., dissenting from the denial of the petition for rehearing *en banc*, *White v. Samsung Electronics Inc.*, 971 F.2d 1395, *petition for reh'g en banc denied*, 989 F.2d 512, 513; *cert. denied*, 508 U.S. 951 (1993).

legislation to the public domain and the future of innovation and to balance that cost against whatever benefits the legislation might offer the public welfare.

II. CONGRESS FAILED IN ITS OBLIGATION TO FULLY CONSIDER THE EFFECTS OF ENACTING THE CTEA

Every law enacted by Congress must be based on powers granted to it by the Constitution: "The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written."[31] The ultimate question for this Court is whether Congress, in enacting the CTEA, violated its constitutional duty when it extended monopoly protection for copyrighted works without regard to the impact upon the accessibility of cultural products for new creation and the enrichment of the public. The Constitution grants Congress the power to legislate copyright protection for authors, but requires that Congress exercise this power in order to promote the public interest. Congress neglected this limiting principle when it enacted the CTEA, which blocks the entry of works into the public domain and thereby damages a mechanism that contributes substantially to cultural progress.

Any major adjustment in the scope of intellectual property protection must be directly linked to the promotion of creation and innovation. In *Graham v. John Deere Co.*, the Court stated that the grant of authority over patents in the intellectual property clause:

> [I]s both a grant of power and a limitation. This qualified authority, unlike the power often exercised in the sixteenth and seventeenth centuries by the English Crown, is limited to the promotion of advances in the 'useful arts.'[32]

31. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

32. 383 U.S. 1, 5 (1966).

The Court further stated that "Congress in the . . . exercise of the patent power may not . . . enlarge the patent monopoly without regard to the innovation, advancement, or social benefit gained thereby."[33] While *Graham* specifically addressed constraints on the congressional patent power, Congress' power over copyrights is similarly limited.[34] But in enacting the CTEA, Congress failed to give due regard to the public purposes of copyright.

Before passing the CTEA, Congress appears to have paid insufficient attention to the Constitutional basis for its actions and to have given great credence to issues tangential to its constitutional duty. Had it thoroughly examined the implications of the extension, Congress would have found it constitutionally unwarranted. While the House and Senate Judiciary Committees issued reports after holding numerous hearings in successive Congresses, the Congress did not adequately address many issues that should have been considered, including the threat term extension poses to the public domain as a "creative commons."[35]

Of course, Congress did suggest various affirmative justifications for the CTEA, but none of these furthered the constitutional purpose of copyright. Their presence in the record is insufficient to uphold legislation that violates the constitutional limitation on the exercise of its congressional power.

In *United States v. Lopez*, the Court held that Congress' exercise of regulatory authority under the commerce clause must

33. *Id.* at 6.

34. *See* Ochoa, *supra* note 10, at 103-6.

35. *See generally* S. Rep. No. 104-315 (1996); H.R. Rep. No. 105-452 (1998).

be carefully scrutinized when it is in tension with an important limiting constitutional principle.[36] There this Court took a critical view of the congressional justifications for the exclusion of guns from school zones because Congress' power was constrained by constitutional limitations relating to federalism. Here, this Court should scrutinize the proffered congressional justifications for the CTEA with similar care, because the constitutional grant of power to create protections for authors is constrained by the intellectual property clause's requirement that such protection be solely for the promotion of cultural and scientific progress. In exercising this power, Congress "may not overreach the restraints imposed by the stated constitutional purpose."[37]

Among the asserted justifications for term extension were harmonization of U.S. copyright law with the law of the European Union ("E.U."), the provision of benefits to authors and their heirs, and even the promotion of motion picture preservation. The foregoing reasons, however, all fail to support an exercise of congressional power that disregards the constitutional mandate to balance exclusive rights with the promotion of progress. All of these justifications are irrelevant to the constitutional purpose of copyright and most are without factual foundation. In addition, the CTEA fails to provide meaningful incentives to creativity and innovation of the kind that the U.S. copyright system is designed to afford.

36. 514 U.S. 549, 564 (1995) ("We rejected these [government] arguments because . . . if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."). In the Court of Appeals below, Judge Sentelle stated, "Congress concluded a given piece of legislation that serves a constitutional purpose 'does not necessarily make it so.'" *Eldred v. Reno* 253 F.3d at 854 (2001) (Sentelle, J., dissenting) (citing *Lopez*, 549 514 U.S. at 557 n.2, *United States v. Morrison*, 529 U.S. 598, 614 (2000).

37. *Graham*, 383 U.S. at 5-6.

A. EUROPEAN UNION HARMONIZATION

The justification most widely offered to Congress in support of the CTEA was the importance of bringing U.S. copyright law into alignment with E.U. law.[38] For example, the Motion Picture Association of American ("MPAA") offered testimony stating that copyrighted works were America's most successful export, earning roughly $45 billion a year abroad, but that some additional potential revenue was diverted from U.S. copyright holders due to the disparity of protection between the U.S. and some European nations.[39] Accordingly, the industry concluded that this revenue could be preserved only by passing the CTEA and, thus, securing 20 years of additional protection for U.S. works in Europe. However, the maintenance of the U.S. position in the international information marketplace, whether desirable or undesirable, is an objective unrelated to the kind of "progress" envisioned in the constitutional clause regarding intellectual property.

The goal of copyright is not to create wealth, but to stimulate innovation. While E.U. harmonization might produce wealth for some, the costs to domestic "progress" are potentially steep. Americans, who are greater users of U.S. works than citizens of other countries, now must suffer from the discouraging effects of copyright extension upon domestic creativity.[40]

The inappropriateness of discouraging new domestic creativity in order to align U.S. law with that of Europe becomes

38. *See generally* S. Rep. No.104-315 (1996); H.R. No. 105-452 (1998).

39. *See The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Senate Judiciary Comm.*, 104th Cong. 40-41 (1995) ["1995 Senate Hearings"] (statement of Jack Valenti, President and Chief Executive Officer, Motion Picture Association of America (["Valenti statement"])).

40. *See infra* notes 50-66 and accompanying text.

even more apparent when one considers the different bases of European and U.S. intellectual property systems. The ultimate goal of European copyright law is to benefit authors and creators rather than to promote a larger public purpose; European law embodies a natural rights theory that treats copyright as a simple entitlement.[41] Conversely, the U.S. copyright system is based on the unequivocal constitutional directive that new innovation be promoted through limited economic incentives. This incentive-based scheme explicitly rejects any focus on natural rights.[42] Consequently, the U.S. cannot, consistent with the Constitution, fully align itself with the philosophically different E.U. system.[43]

41. *See* Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* 5-6 (1987) "([Eighteenth century French copyright laws placed authors' rights on a more elevated basis than the [British] Statute of Anne. . . . [T]he rights being protected [were treated] as being embodied in natural law. . . . This new conception of author's rights had a great effect on the law of France's neighbors. . . .").

42. *See* 33 U.S. (8 Pet.) at 657-63, *see also* H.R. Rep. No. 2222, at 7 (1909):

> The enactment of copyright legislation by Congress under the terms of the Constitution is not based on any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but on the grounds that the welfare of the public will be served and the progress of science and useful arts will be promoted. . . .

By the same token, in the United States copyright is viewed as an "impingement on the public domain," a concept that would have no meaning in the European philosophical context. *See* L. Ray Patterson, *Free Speech, Copyright and Fair Use*, 40 Vand. L. Rev. 1,7 (1987).

43. *See* Dennis S. Karjala *et al.*, *Statement of Copyright and Intellectual Law Professors in Opposition to H.R. 604, H.R. 2589, and S.505* (Jan. 28, 1998) http://www.law.asu.edu/HomePages/Karjala/

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B. BENEFIT TO AUTHORS

In justifying the CTEA, Congress also relied on the fact that term extension would generate benefits to copyright owners, including individual authors and their families, in the form of possible additional revenue from their works. While such benefits may be welcome, they do not in themselves represent "progress" in the constitutional sense and therefore cannot be weighed against the costs to new creativity that flow from the harm the CTEA has wreaked on the public domain.

As demonstrated below,[44] neither the prospect of additional income from Europe, nor the increased domestic protection provided by the CTEA, functions as a meaningful incentive to new creativity or innovation, the only constitutional basis that would have enabled congressional action in enacting the CTEA. In the legislative history, however, it is suggested that Congress may have regarded the benefits of term extension to copyright owners, particularly the heirs of individual authors, as an independent justification for term extension.[45] If so, this rationale represents a fundamental congressional misunderstanding of the constitutional goals of the U.S. intellectual property system.

This is true, in particular, with respect to one provision of the CTEA that was specifically designed to benefit individual authors and their successors, which amends section 304 of the

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OpposingCopyrightExtension/legmats/1998Statement.html (last visited, May 14, 2002): ("[W]e cannot allow discrimination in Europe to force us to change our entire intellectual property philosophy — based on the public interest — just to put a few dollars into the pockets of descendants and assignees of creative authors from the distant past.")

44. *See* discussion *infra* pp. 23-28.

45. *See, e.g., 1995 Senate Hearings*, *supra* note 39, at 58-59 (statement of Mrs. Henry Mancini, widow of Henry Mancini).

Copyright Act. The amendment grants an extra opportunity to reclaim rights that authors and their successors had assigned away. This provision was specifically designed to give "original authors or their dependents . . . the opportunity to bargain for the rights provided by the 20-year copyright term extension," (if and only if they had not already exercised termination rights in the 19-year additional term provided by the 1976 Act.)[46] In other words, the CTEA gives some authors and heirs an additional chance to take a "second bite at the apple" in exploiting their works. Although this economic opportunity may represent a desirable reallocation of wealth among authors' families and authors' assignees, it is irrelevant to the constitutional purpose of copyright and fails to serve as a true incentive to new creation.

C. FILM PRESERVATION

Another rationale presented to and embraced by Congress was the purported effect of term extensions in promoting the preservation of historic American films.[47] However, this justification fails to support the enactment of the CTEA for several reasons. As important as maintaining old commercial motion pictures may be, this function is not the objective of the copyright system, which exists to promote *new* innovation and creativity. Moreover, Congress had before it no testimony from which it could conclude that the asserted connection between extended protection and film preservation was a genuine one.[48]

46. Copyright Act, 17 U.S.C. §§ 303-304 (2000).

47. *See* Valenti statement, *supra* note 39, at 42, and S. Rep. No. 104-315 at 13 (1996).

48. *See* Ochoa, *supra* note 10, at 123-4

"The CTEA is not narrowly tailored to serve this objective; it extends all existing copyrights, whether or not the work

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Because the physical instability of nitrate motion picture stock results in the certain eventual decomposition of the original negatives as well as surviving prints, this extension serves to make films that would have entered the public domain unavailable for preservation by independent enthusiasts and entrepreneurs while that preservation is still possible.[49] Thus, this extension, by making these films legally inaccessible, actually prevents many priceless motion pictures from ever being restored.

D. LACK OF ADDITIONAL INCENTIVES AND NEW DISINCENTIVES FOR INDIVIDUAL CREATORS

Although promoting creativity was a rationale for enacting the CTEA,[50] Congress did not seriously evaluate the CTEA's

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> is in any danger of deterioration . . . reward[ing] those corporate copyright owners who allowed the films to deteriorate in the first place, without requiring any restoration efforts at all. If films were allowed to enter the public domain sooner rather than later, they would not disappear; instead they could be restored by [other] organizations."

49. *See* John McDonough, *Motion Picture Films and Copyright Extension* (2002), http://www.public.asu.edu/~dkarjala/commentary/McDonough.html (last visited May 13, 2002).

50. *See, e.g., 1995 Senate Hearings, supra* note at 55-57 (statements of Don Henley, Bob Dylan and Carlos Santana) (asserting that support of the CTEA was based primarily on the potential exploitations of their grandchildren); *compare with* S. Rep. No. 104-315, at 32 (1996) (statement of Sen. Brown in dissent):

> There is nothing in the hearing record that suggests extending the copyright term will result in more works or

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incentive effects, if any, on authors considering new creative efforts. In one respect, of course, the incentive rationale was utterly without merit: By definition, retrospective term extension for existing works cannot promote new creativity. There can be no incentives to create works that already exist.

Moreover, as the Register of Copyrights conceded in her Senate testimony, the positive incentive effects of the additional terms for new works are at best trivial.[51] The additional protection will only take effect far in the future, when the present discounted value of any additional revenue is vanishingly small, to say nothing of highly uncertain. In contrast, through additional access costs and problems in obtaining copyright clearances, the CTEA imposes immediate and significant disincentives on contemporary authors seeking to create new works.

The CTEA added 20 years of protection to the end of an existing life-plus-50 year term. The possibility of income so far in the future can provide at best a negligible additional incentive for current productive effort, even given unrealistically generous assumptions. An example would be the case of a 35-year old author, who writes a book today that will generate an assured annual royalty of $5,000 throughout the term of protection under the CTEA – 110 years if the author lives to be 75. If this individual's personal discount rate is 5 percent, the total economic value of the final 20 years of protection at the time of

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> higher quality works. Indeed our success as a nation of creators suggests the opposite. The majority report observes that copyright term extension may provide an incentive to create for corporate creators: another 20 years of revenue from current works might, for example, subsidize new motion pictures. However, this is more a corporate subsidy than an incentive to create.

51. *See infra* note 64.

the work's creation would be only $771.80.[52] In fact, individuals' real discount rates are actually much higher, reducing further any present incentive value of copyright protection in the remote future.[53] Moreover, for many creative works the potential for future returns is highly uncertain, rather than assured, and likely to decrease over time. These factors would cause the contemporary author to further discount the present value of possible future income.[54] However, there is no indication that in enacting the CTEA Congress took the economic realities of incentives into account in assessing the benefits and costs to creativity.

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52. By contrast the cumulative *present* value of economic returns from years 0 to 90 is $98,761.31. This can be measured by summing the present value of each year's return. The present value of a payment in the future is $[1/(1+r)^t]A$, where r is the discount rate, t is the years in the future, and A is the payment amount. *Cf.* Stephen Breyer, *The Uneasy Case for Copyright*, 84 Harv. L. Rev. 281, 324 (1970) (increased present value of term extension is "hardly enough to effect [the author's] decision to write in the first place. . . .").

53. The discount rate should reflect both the inflation rate and some additional amount, because people prefer money in the short term and could make alternative investments of money (or creative effort). *See, e.g.*, Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 Colum. L. Rev. 941, 958-59 (1999).) Individuals may have personal economic discount rates that approach 50% per year, which are not limited to monetary decisions, but also affect other choices. *See, e.g.*, U. Benzion, *et al.*, *Discount Rates Inferred from Decisions: An Experimental Study*, 35 Management Science 270 (1989); R.H. Thaler, *Some Empirical Evidence on Dynamic Inconsistency*, 8 Economic Letters 201 (1981); G.B. Chapman, *Temporal Discounting and Utility for Health and Money*, 22 J. Exper. Psych.: Learning, Memory, and Cognition 771 (1996).

54. *See, e.g.*, Breyer, *supra* note 53, at 324, n.169; *see also* Paul Goldstein, *Copyright § 4.7*, at 4:138 (Supp. 2001) ("According to the 1961 Report of the Register of Copyrights, fewer than fifteen percent of all copyrights were renewed under the 1909 Act.").

The CTEA imposes substantial and immediate disincentives on authors seeking to create new works that far outweigh any trivial and uncertain economic incentives for current production. Because of the CTEA, authors will continue to need rights clearances to draw upon existing copyrighted material that would otherwise enter the public domain. As a result, they will encounter extra expense, hardship and uncertainty, all of which stifle the creative process.[55] For example, concerns over potential liability dictate that any copyrighted work used in a film, even incidentally, must be cleared.[56] This applies even to the use of a poster on a wall or a billboard in the background: "Almost every piece of artwork, any piece of furniture, or sculpture, has to be cleared before you can use it."[57] This clearance problem was highlighted by a successful director who, when asked what advice he would give to a young film maker, replied:

> I would say to an 18-year-old artist, you're totally free to do whatever you want. But – and then I would give him a long list of all the things that he couldn't include in his movie because they would not be cleared, legally cleared. That he would have to pay for them. [So freedom? Here's the freedom]: You're totally free to make a movie in an empty room, with your two friends.[58]

Another serious inhibition on the creative process resulting from copyright extension is the rigid control often wielded

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55. Lawrence Lessig, *The Future of Ideas* 3-4 (2001).

56. *See, e.g.*, *Woods v. Universal City Studios, Inc.*, 920 F. Supp 62 (S.D.N.Y. 1996) (enjoining distribution of the film *Twelve Monkeys* because an artist claimed a chair shown briefly in the movie resembled a sketch of a piece of furniture he had designed).

57. Lessig, *supra* note 56, at 3 (quoting Davis Guggenheim in a telephone interview conducted by Lawrence Lessig on Nov. 15, 2000).

58. *Id.* at 5.

by heirs to works, long after the original authors' deaths. Such barriers, now wholly disassociated from the incentives that once inspired the works' creation, frustrate the creativity of new authors. For example, the Gershwin Family Trust retains complete control over the present stage uses of *Porgy and Bess* (1935),[59] demanding absolute compliance with their wishes by potential licensees. A notable condition is that the work be performed only by an all-black cast.[60] George Gershwin has been dead for 65 years; new and varied styles of performance and theatrical representation have emerged since his death.[61] His work could serve as an inspiration for creative interpretations of the powerful themes he introduced; however, his heirs remain inflexible.

Similarly, Margaret Mitchell's estate maintains an iron grip on the classic novel *Gone With the Wind*, published in 1936. Although the copyright for *Gone With the Wind* was initially due to expire in 1992, successive term extensions culminating with the CTEA have restricted the free availability of the work for use and adaptation by artists and the public until 2031. The Mitchell estate is thus in a position to aggressively prosecute

59. *See* John Ardoin, *The Great "Porgy" Debate*, http://www.pbs.org/wnet/gperf/porgy/html/work.html (last visited May 8, 2002). *Porgy and Bess* is derived from Edwin DuBuse Heyward's book *Porgy* (1924). The book was based upon newspaper articles and real life memories of Heyward's life in Charleston: his access to the public domain enriched his story and Gershwin's subsequent opera. *Id.*; *See also* Anthony Tommasini, *All-Black Casts for 'Porgy'? That Ain't Necessarily So*, N.Y. Times, Mar. 20, 2002, at E1.

60. *See* Gail Russell Chaddock, *Public Interest v. Private Rights*, Chi. Sun-Times, June 2, 1998, at 31.

61. *See, e.g., Patrick Stewart: The Veteran Shakespearean Actor Brings a "New Kind of Othello" to The Shakespeare Theatre*, http://www.shakespearedc.org/stewart1.html (last visited May 9, 2002) (discussing the novelty of the casting of Patrick Stewart as Othello while casting people of color in all other principal roles).

authors such as Alice Randall. Randall recently attempted to draw upon *Gone With the Wind* as a source for creating her own Afro-centric comment on this historically important work. Her creative effort resulted not only in a socially relevant work, *The Wind Done Gone*, but a lengthy lawsuit including, initially, an injunction against the book's publication.[62] Some determined authors, like Randall, ultimately may succeed in overcoming the chilling effect of copyright term extension. However, its discouraging effect on others, and the resultant costs to public culture, are incalculable.

E. ECONOMICS OF CORPORATE CULTURAL PRODUCTION

With respect to both prospective and retrospective copyright term extensions provided by the CTEA, Congress may also have been influenced by a rationale advanced by corporate copyright holders, most persuasively in the testimony of Jack Valenti, President of the MPAA: Valenti argued that corporations would respond to the economic benefit they received from term extension by engaging in new production of copyrightable works, stating that:

> One of the great secrets of the American dominance in the world is their ability to pour into a film enormous resources. The most talented people in the world cost money. . . . Unless we are able to protect what we own in our libraries, we will be unable in the future, in the year 2010 and thereabouts, when the new technology has avalanched through this

62. *See Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp.2d 1357 (N.D. Ga. 2001), *rev'd*, 268 F.3d 1257 (11th Cir 2001); *see also* David Kirkpatrick, *Mitchell Estate Settles 'Gone With the Wind' Suit*, N.Y. Times, May 10, 2002, at C6, Col. 1 (discussing the case's recent settlement). The issues raised by the case remain pertinent because "the settlement did not affect rights to film adaptations or any other versions of 'The Wind Done Gone.'" *Id.*

> whole landscape, not in this country, but around the world, then we are doing a terrible economic injustice to the Treasury of the United States.[63]

At least one government witness echoed this rationale:

> [I]t is difficult to see how moving from a term of life-plus-50 to life-plus-70 will encourage authors to write. It could, however, provide additional income that would finance the production and publication of new works.[64]

However, Congress could not constitutionally employ the grant of intellectual property power to distribute economic windfalls that might (or might not) be used to finance hypothetical future production in general, as Valenti requested. As this Court has repeatedly noted, the Constitution contemplates incentives for the "encouragement of individual effort" by authors to create particular new works.[65] In arguing for the CTEA, corporate copyright owners sought and received an umbrella of additional copyright protection designed to increase their overall economic security and profitability, rather than to directly promote specific creative projects.

This justification for the CTEA may represent the vision of corporate copyright owners today, but it is in direct conflict with the vision, intent and practice of the Framers. U.S. copyright law was designed to promote the public good by giving direct incentives to creativity and innovation, not to enhance corporate balance sheets.

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63. Valenti statement, *supra* note 39, at 90.

64. *1995 Senate Hearings*, *supra* note, at 6 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

65. *Harper & Row*, 471 U.S. at 558.

This Court recently expressed skepticism about arguments that cultural progress can best be achieved by interpreting copyright law to accommodate large scale information industry business models. In *Tasini*, which concerns the imbalance of power between large publishing companies and freelance writers who contributed to their publications, this Court concluded that the "public welfare" would suffer if the interests of individual writers were overshadowed by the welfare of corporate content aggregators.[66] As this Court has appropriately recognized, copyright law as envisioned by the Framers was designed to promote the public welfare by encouraging authors to create, not by subsidizing corporate scale.

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66. *Tasini*, 533 U.S. at 496 n. 3 (citing *Harper & Row*, 471 U.S. at 558 (quoting *Mazer*, 347 U.S. at 219)) (protecting the copyrights of freelance authors that had been preempted by print publishers and database corporations).

CONCLUSION

Congress failed the American people by not performing its constitutional duty to balance the speculative and questionable benefits of copyright term extension against the certain harms to the public domain. This failure is reflected in the lack of any rationale for the legislation that is supported by a legitimate constitutional purpose. Congress enacted the CTEA based upon justifications that, although superficially attractive, were not relevant to, or lacked a demonstrated connection with, the Framers' mandate that copyright law promote cultural progress. Instead, the CTEA stifles creativity that draws upon existing works and denies society the benefits of a vibrant public domain. This Court must ensure that Congress, in exercising power over copyrights, fulfills its constitutional duty to consider with great care the effect of copyright protection on the progress of "Science and the useful Arts." Protections that do not promote this progress should be struck down.

Respectfully submitted,

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